RECENT CASES.

BANKRUPTCY — PREFERENCES — BANK DEPOSITS. — The bankrupts during the three days before the filing of their petition in bankruptcy deposited $5000 in a bank in which they habitually kept an account. The bankrupts were at the time insolvent, as the bank knew, and were liable on notes to the bank for $40,000. *Held*, that the deposit is not a preference, and may be set off against the bank's claim. *New York County National Bank* v. *Massey*, 24 Sup. Ct. Rep. 199.

The deposit was considered not a preference because § 60a defining preferences requires a "transfer" of property and § 1, (25) provides "'transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." The court lays stress on the last six words. Those words, however, may well be taken as examples and the real definition be found in the first part of the clause, as was done in the court below. *In re Stege*, 116 Fed. Rep. 342. Such an interpretation, it is true, would make the set-off provisions inconsistent with the preference provisions in a very few cases, of which this is the first to arise. In these cases the general purpose of bankruptcy legislation looking to equality among creditors would indicate that the preference provisions should control. By the rule of the principal case a crafty debtor by making loans instead of payments could favor what creditors he chose, thus making useless the elaborate guards against preferences.

CARRIERS — RAILROAD'S LIABILITY FOR LOSS OF BAGGAGE UNACCOMPANIED BY OWNER. — The plaintiff checked his trunk from New Jersey to Wiscasset, Maine. The trunk reached Wiscasset over the defendant's railroad in due time, but the plaintiff, having gone in part by another route, did not arrive there until the next day. In the mean time the contents of the trunk were stolen from the baggage room. *Held*, that the defendant is a gratuitous bailee and bound to exercise no more than ordinary care. *Wood* v. *Maine Central R. R. Co.*, 56 Atl. Rep. 457 (Me.).

A common carrier is liable as an insurer for a passenger's baggage. *Hannibal Railroad* v. *Swift*, 12 Wall. (U. S.) 262. Baggage consists of those articles usually taken by travellers for their pleasure, convenience, and comfort. The right to take baggage is merely incidental to the right to be carried as a passenger. Consequently goods sent by a road other than that which the traveller takes are not baggage. *Marshall* v. *Pontiac, etc., R. R. Co.*, 126 Mich. 45. Furthermore it has generally been held that, apart from special agreement, goods are not baggage when, without fault of the carrier, they do not go on the same train with their owner. *Wilson* v. *Grand Trunk Ry.*, 56 Me. 60. It would seem more reasonable that goods should be considered baggage, whether they precede or follow the passenger, if they are *bona fide* incidental to passage over the carrier's line. As the law is settled otherwise, the principal case is sound on any view of the facts. Since the defendant never assented to carrying the trunk as freight, or to holding it as a warehouseman or a bailee for hire, the court rightly held the liability to be only that of a gratuitous bailee.

CONFLICT OF LAWS — CONTRACTS — DAMAGES RECOVERABLE FOR BREACH. — The defendant negligently failed to deliver in South Carolina a telegram sent in North Carolina, thereby causing mental suffering to the plaintiff. Recovery for mental anguish could be had by North Carolina, but not by South Carolina, law. *Held*, that the plaintiff can recover damages for mental anguish. *Bryan* v. *Western Union Tel. Co.*, 45 S. E. Rep. 938 (N. C.).

The court brought the case under the general rule, supported by the weight of American authority, that the law of the state where the contract is made, not where it is to be performed, tests its validity, nature, and interpretation. *Staples* v. *Nott*, 128 N. Y. 403; see 13 HARV. L. REV. 296. The principle has been applied where the validity of a clause in a contract limiting liability for non-delivery of a telegram was in issue. *Reed* v. *Western Union Tel. Co.*, 135 Mo. 661; *contra*, *Burnett* v. *Penn. R. R. Co.*, 176 Pa. St. 45. But in the principal case the kind of damages recoverable for non-delivery depends, not on any provision of the contract, but on the provisions of the law which gives the right to damages of any kind for its breach. This right to damages is distinct from the right to performance given by the contract. It arises from a

failure to perform. The only law that can effectively declare that any failure to act gives rise to a right is the law of the place where the failure to act occurs. The extent of the right in the principal case, therefore, should depend on the law of the place of performance. *Ex parte Heidelback*, 2 Low. (U. S. Dist. Ct.) 526; *Bowen* v. *Newell*, 13 N. Y. 290.

CONFLICT OF LAWS — TAKING OF DEPOSITION FOR USE OUTSIDE THE STATE. By the laws of Oklahoma, notaries public may take depositions to be used in the courts of that Territory, provided one day's notice is given to both parties to the action. By the laws of Missouri, notaries public may take depositions in that state, provided three days' notice is given. The petitioner, subpœnaed by a Missouri notary to give a deposition in an Oklahoma action, refused to testify on the ground that the notice given was insufficient according to Missouri law. Being committed for contempt, he brought *habeas corpus* proceedings. *Held*, that since the sufficiency of the notice is to be determined by Oklahoma law, the commitment is valid. *In re Woggan*, 77 S. W. Rep. 490 (Mo., Ct. App.).

As few jurisdictions have provided until recently for commitment for a refusal to give evidence for use without the state, the case is one of first impression. The question whether the deposition is admissible in the Oklahoma action must clearly be decided by the law of that forum. *Evans* v. *Eaton*, 7 Wheat. (U. S.) 356, 426; *McGeorge* v. *Walker*, 65 Mich. 5. The court seems to have confused that question with the one really presented by the case, namely, upon what condition a Missouri witness may lawfully be required to give evidence before a Missouri notary in Missouri. In issuing the warrant of commitment the notary was acting as an officer of Missouri, and his act had significance only by virtue of a statute of that state, which, being in derogation of the liberty of the citizen, should be strictly construed. *Ex parte Mallinkrodt*, 20 Mo. 493. It would appear that the requisites for the validity of such a warrant should be determined by the law which alone gives the warrant force.

CONSTITUTIONAL LAW — DUE PROCESS — LOCAL ASSESSMENTS. — The defendant city's charter gave it the right to order owners of property abutting on the water front to erect docks on or in front of their premises, and, in case they failed to comply with the order within a certain time, to award the contract for such work and to levy the cost on the land as a local assessment. *Held*, that the charter provision is unconstitutional as depriving the plaintiff of his property without due process of law. *Lathrop* v. *City of Racine*, 97 N. W. Rep. 192 (Wis.).

Building docks for public use seems analogous to other public improvements, as, for example, the laying out of streets. Local assessments upon the abutting land to meet the expense of such improvements are generally held an exercise of the taxing power rather than of the police power. *Motz* v. *City of Detroit*, 18 Mich. 495; see *Chicago, etc., R. R. Co.* v. *City of Ottumwa*, 112 Ia. 300, 305. The basis for upholding their constitutionality is the equity of compelling property specially benefited by the improvement to contribute toward the expense to the extent of such benefit. *Edwards* v. *Walsh Construction Co.*, 117 Ia. 365. There is a strong presumption that the legislative body or commission making the assessment has decided rightly as to the extent of the benefit resulting to the assessed property. *Chicago & Alton R. R. Co.* v. *City of Joliet*, 153 Ill. 649. The courts will interfere, however, in cases where the assessment is palpably unjust. *Zoeller* v. *Kellogg*, 4 Mo. App. 163; *Norwood* v. *Baker*, 172 U. S. 269. In the principal case the charter apparently gave authority to assess the property on the water front regardless of any benefit resulting from the construction of the docks; and the decision consequently appears entirely sound. *Sears* v. *Street Commissioners of Boston*, 173 Mass. 350. For a fuller discussion of the general question of local assessments see 14 HARV. L. REV. 1, 98; 15 HARV. L. REV. 307.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS. — The mechanics' lien law provided that "in an action brought by any artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action." Gen. St. Kan. 1901, § 5125. *Held*, that the statute is unconstitutional as denying the equal protection of the laws. *Atkinson* v. *Woodmansee*, 74 Pac. Rep. 640 (Kan.).

It is well established that the legislature may make classifications and distinctions based thereon. But the "classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. There seems to be no reason of public policy

requiring the prompt payment of claims for which a mechanics' lien will attach, which cannot be urged with equal force in the case of many other classes of claims. The decision therefore appears sound in holding the statute unconstitutional. *Gulf, etc., R. R. Co.* v. *Ellis*, 165 U. S. 150. While the constitutionality under the Fourteenth Amendment of the particular statutory provision involved does not appear to have been directly adjudicated before, it has occasionally been questioned under similar provisions in state constitutions. While these decisions are in some conflict, the weight of authority is in accord with the decision in the principal case. *Grand Rapids Chair Co.* v. *Runnells*, 77 Mich. 104; *Randolph* v. *Builders, etc., Co.*, 106 Ala. 501; *contra*, *Wortman* v. *Kleinschmidt*, 12 Mont. 316.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — DISCRIMINATION AGAINST NEGROES AS JURORS. — An Alabama statute provides that commissioners shall select from the male residents of each county such persons as in their opinion are fit and competent to discharge the duties of jurors. A negro, indicted by a grand jury thus drawn, moved to quash the indictment, on the ground that the commissioners had excluded all negroes from the list from which the grand jury was drawn, solely on the ground of color. The motion was stricken from the files and the defendant's exceptions to this action overruled, on the ground that the motion was not made in proper form. *Held*, that a federal question is raised and that the defendant is deprived of the "equal protection of the laws." *Rogers* v. *Alabama*, 24 Sup. Ct. Rep. 257. See NOTES, p. 351.

CONSTITUTIONAL LAW — EXCLUSION OF FOREIGN CORPORATIONS BY A STATE. A state statute imposed conditions upon foreign corporations continuing to do business in the state. Certain foreign corporations already in the state sought to enjoin the enforcement of the statute on the ground that it was unconstitutional under both the state and the national constitutions. *Held*, that the plaintiff, being a foreign corporation, cannot object to the statute. *Hartford Fire Ins. Co.* v. *Perkins*, 125 Fed. Rep. 502 (Circ. Ct., S. Dak.).

The court here refused the injunction on the ground that a foreign corporation has no constitutional right to do business in a state, and consequently cannot be injured by any condition imposed upon it by the legislature; and therefore is in no position to object to the constitutionality of such conditions. This view, in assuming that a condition imposed by the legislature is necessarily imposed by the state, overlooks the consideration that the legislature represents the state only when acting within constitutional limits. Objections under the state constitution should, therefore, be open to foreign corporations in order that they may protect rights vested under previous constitutional legislation. *Niagara Fire Ins. Co.* v. *Cornell*, 110 Fed. Rep. 816. Moreover, even conditions imposed by the state must not conflict with the national constitution which forms a part of the supreme law of the land. *Commonwealth* v. *Mobile, etc., Ry. Co.*, 64 S. W. Rep. 451 (Ky.). For instance, foreign corporations may invoke the protection of the federal constitution against conditions which impair vested contract rights. *New York, etc., Ry. Co.* v. *Pennsylvania*, 153 U. S. 628. The principal case is believed to be a misconception and unsupported by authority.

CONSTITUTIONAL LAW — POLICE POWER — CLASSIFICATION. — A state statute required the examination and registration of plumbers and the observance of specified regulations in plumbing in cities exceeding a certain population. *Held*, that the statute is constitutional. *Beltz* v. *Pittsburg*, 34 Pittsburgh L. J. 197 (Ct. of C. P. No. 1, Allegheny Co., Pa.).

The liberty and equal protection of the laws guaranteed to citizens by the Constitution are admittedly not infringed by a reasonable exercise of the police power in the promotion of health, good order, or morals. *Ruhstrat* v. *People*, 185 Ill. 133. Thus, the plumbing of dwelling-houses and the examination and licensing of plumbers are proper subjects of legislative regulation. *People* v. *Warden of City Prison*, 144 N. Y. 529. Moreover, police regulations may be applied to particular localities only, and will be consistent with the equal protection of the laws so long as the classification of localities is reasonable. *Sutton* v. *State*, 96 Tenn. 696. If the classification is unreasonable, although made in good faith, several states hold that the statute is unconstitutional. *In the Matter of Jacobs*, 98 N. Y. 98; see *Ruhstrat* v. *People*, *supra*. The weight of authority, however, holds that unless the classification is so unreasonable as to disprove good faith, it is constitutional. *Hayes* v. *Missouri*, 120 U. S. 68; *State* v. *Chicago, etc., R. R.*, 68 Minn. 381. Since the importance of sanitation varies according to the density of population, the classification in the present statute appears reasonable, and on either view this exercise of the police power seems constitutional.

CONSTITUTIONAL LAW — THIRTEENTH AMENDMENT — FEDERAL STATUTES SECURING RIGHT TO OWN REALTY. — The Federal Civil Rights Act (U. S. Comp. St. 1901, p. 1262) secures to negroes the same privileges to acquire and to own real property as are enjoyed by white citizens. The defendants were indicted under U. S. Comp. St. 1901, p. 3712, for conspiring to intimidate negroes in the exercise of the right thus secured. *Held*, that the Civil Rights Act is constitutional under the Thirteenth Amendment. *United States* v. *Morris*, 125 Fed. Rep. 322 (Dist. Ct., E. D. Ark.).

The statute cannot be upheld under the Thirteenth Amendment, which prohibits involuntary servitude, unless the bestowal of the right to acquire and own real property is an appropriate method of preventing involuntary servitude. Though interference with this right could hardly go far toward producing slavery, it is clear that to a certain extent it is easier to enslave persons who have not been allowed to own real property, than persons who have freely exercised this right, and interference with the right to acquire realty has been a feature of movements whose apparent object was to reduce the negro to a condition of serfdom. These considerations would seem to justify the decision, for in selecting means for the protection of rights conferred by the constitution, Congress should be permitted to make provision for situations which are remote and potential, as well as for those which are apparent and imminent. *Cf. McCullough* v. *Maryland*, 4 Wheat. (U. S.) 316, 421. The principal case is sustained by two federal decisions in which the constitutionality of the same act was involved. *United States* v. *Rhodes*, 1 Abb. (U. S. C. C.) 28; *In re Turner*, 1 Abb. (U. S. C. C.) 84.

CONSTRUCTIVE TRUSTS — RECOVERY FROM TRANSFEREE OF FORGED TRANSFER OF STOCK. — The defendant innocently presented a forged transfer of stock to the plaintiff company and received new certificates, which were in turn transferred to *bona fide* purchasers. When the forgery was later discovered, the plaintiff was forced to issue equivalent stock to the true owner, and now seeks indemnity from the defendant. Neither party was negligent. *Held*, that the defendant is not liable. *Corporation of Sheffield* v. *Barclay*, [1903] 2 K. B. 580.

The decision of this case in the court below was discussed in 16 HARV. L. REV. 228; see also 4 *ibid.* 297, 307, 307 n. 3.

CONTRACTS — CONSTRUCTION OF CONTRACTS OF EMPLOYMENT. — The respondent contracted to act as superintendent of a cotton compress and warehouse for the appellant company. In an action by the respondent to recover damages for an alleged unlawful discharge, the trial court ruled that the respondent might, during the employment, lawfully perform services to third persons which did not interfere with his work for the appellant. *Held*, that the ruling is erroneous, since the respondent owed all of his time to the appellant. *Atlantic Compress Co.* v. *Young*, 45 S. E. Rep. 677 (Ga.).

The meaning of the term "superintendent" in the present contract requires a knowledge of the duties of a superintendent in that occupation. If the employment is one in which the employee is hired merely to accomplish definite tasks, the court may well find that his hours of work are discretionary and that he has not promised his whole time to his employer. *Jaffray* v. *King*, 34 Md. 217. If, on the other hand, the employee's duty is to attend, like an operative, to such tasks as may arise during business hours, the court may find that he has promised all his working time. Had the duties of the present employee been unfamiliar to the court, the court might better have required the jury to find them before construing the contract, since the jury finds the meaning of technical terms. *Hutchinson* v. *Bowker*, 5 M. & W. 535. If, however, these duties were a matter of common knowledge in the jurisdiction, the court could take judicial notice of them. *Brown* v. *Piper*, 91 U. S. 37. Since this might fairly have been the fact, the decision seems sound.

CORPORATIONS DE FACTO — EFFECT OF STATUTES PASSED AFTER ORGANIZATION. — Under an unconstitutional statute, a school district organized as a corporation. Subsequently a constitutional statute was passed, but no attempt was made to organize thereunder, and the user of assumed corporate power under the original organization was continued. To an action of contract against the corporation, it was objected that no corporation existed. *Held*, that the defendant is liable as a corporation *de facto*. *Hancock* v. *Board of Education, etc.*, 74 Pac. Rep. 44 (Cal.).

Upon principle, the state is the sole source of corporate existence. Because of public convenience and business necessity, however, the doctrine of corporations *de facto* has become a recognized exception to this principle. The elements of corporate existence *de facto* are a statute, under which the corporation may be created, a *bona fide* attempt to organize under the statute, and a user of corporate powers. *Finnegan* v. *Noerenberg*, 52 Minn. 239. Under an unconstitutional statute there can be no corporate existence, *de jure* or *de facto*. *Brandenstein* v. *Hoke*, 101 Cal. 131. In the princi-

pal case, therefore, the first and second elements of corporate existence *de facto* are lacking. One jurisdiction, which has hitherto followed *Finnegan* v. *Noerenberg*, has so far inclined in the direction of convenience as to find corporate existence *de facto* when, at the time of organization under the unconstitutional statute, a valid statute existed under which the corporation might legally have organized. *Georgia Southern, etc., R. R. Co.* v. *Mercantile Trust, etc., Co.*, 94 Ga. 306. The present decision is unfortunate in departing still further from the general rule. See 16 HARV. L. REV. 362.

CORPORATIONS — INSOLVENT CORPORATIONS — PREFERENCE AMONG CREDITORS. The acting president of an insolvent corporation made a distribution of the corporate property among some of its creditors. The property was subsequently attached by other creditors of the corporation. *Held*, that the latter cannot inquire into the authorization of the president to create a preference among the corporation's creditors. *Beaman* v. *Stewart*, 74 Pac. Rep. 344 (Col., Ct. App.).

If the president acted with the authority of the directors, the property in suit belonged to the preferred creditors, since it is established in Colorado both that the surrender of an antecedent debt is valuable consideration and that the directors of an insolvent corporation may make a preference among creditors. *Knox* v. *McFarran*, 4 Col. 586; *Farwell Co.* v. *Sweetzer*, 10 Col. App. 421. If, on the other hand, the president acted without special authority, the property remained in the corporation. *Norton* v. *Alabama Nat'l Bank*, 102 Ala. 420. In that event the attaching creditors acquired a valid lien on the property. *Breene* v. *Merchants' & Mechanics' Bank*, 11 Col. 97. For no principal can ratify an unauthorized disposition of his property by his agent so as to destroy the rights of intervening attachment creditors, and it is immaterial that the principal is a corporation. *Galloway* v. *Hamilton*, 68 Wis. 651. Since, then, the validity of the attachment lien depended on whether the property belonged to the corporation at the time of attachment, and since this, in turn, depended entirely on whether the president acted with authority, it would seem to follow that the creditors might inquire into his authority.

DANGEROUS PREMISES — DUTY OF LANDOWNER TO WARN VISITORS OF DANGER OF ASSAULT BY STRANGERS. — The defendant, who maintained a park for the entertainment of the public, with knowledge of a conspiracy on the part of certain persons to assault negroes visiting the park, permitted the plaintiff, a negro, to enter without taking measures to protect him from danger. *Held*, that the defendant is liable for injuries inflicted upon the plaintiff in pursuance of the conspiracy. *Indianapolis Street Ry. Co.* v. *Dawson*, 68 N. E. Rep. 909 (Ind., App. Ct.).

A landowner must exercise ordinary care to keep his premises safe for a business visitor or to warn him of danger arising from their unsafe condition. This principle has heretofore been applied mainly with reference to defects in the physical condition of the premises themselves. *Indermaur* v. *Dames*, L. R. 1 C. P. 274. Recovery has, however, been allowed in one case where the danger was caused by strangers rightfully engaged in shooting on the land. *Conradt* v. *Clauve*, 93 Ind. 476. The principal case goes to the extreme of allowing recovery for injuries intentionally inflicted by third persons whose acts were criminal in their nature. But the fact that the premises were unsafe for the plaintiff and that his presence there would result in the damage complained of was known to the defendant when it invited the plaintiff to enter its park. If as a result of the defendant's invitation an unsuspecting plaintiff has been either intentionally or negligently led into a trap, his right to demand indemnity from the defendant should not depend upon the particular manner in which he meets with injury.

DANGEROUS PREMISES — LIABILITY TO TRESPASSERS — CHILDREN TRESPASSERS. The plaintiff, a child twelve years old, while playing with other children in a grove situated partly on the defendant's and partly on adjacent land, was injured by running into a barbed wire, a remnant of a fence that originally bounded the defendant's land from the rest of the grove. The defendant knew the condition of the property and the habit of children of playing in the grove. *Held*, that the questions of the defendant's negligence and of the plaintiff's contributory negligence should be left to the jury. *Cincinnati, etc., Co.* v. *Brown*, 69 N. E. Rep. 197 (Ind., App. Ct.).

Unlike the "turntable cases," the thing which attracts the children here, namely the grove, is not dangerous in itself nor the instrument of injury; nor is it an artificial structure maintained by the landowner. On the other hand, the instrument of injury, as the landowner knows, has ceased to be of any use. The issue involved is discussed in 11 HARV. L. REV. 349; 12 *ibid.* 206.

EVIDENCE — CUSTOM AS EVIDENCE OF DUE CARE. — The plaintiff, while riding on a ladder on the side of a freight car, was knocked from it and injured by another car

which the defendants had negligently left too near the track. Evidence that it was a general custom among switchmen to ride on the side of freight cars in the yards, was offered to prove the plaintiff's due care. *Held*, that the evidence is admissible. *Boyce* v. *Wilbur Lumber Co.*, 97 N. W. Rep. 563 (Wis.). See NOTES, p. 349.

EVIDENCE — EXPECTANCY OF LIFE — AGE OF PARENTS. — In an action for damages arising from permanent personal injuries, the plaintiff desired to show an expectancy of life beyond that given in the mortality tables by the testimony of experts who were to base their opinions on the mortality tables and on the fact that the plaintiff's father and grandfather lived to advanced ages. *Held*, that the evidence is not admissible. *Hamilton* v. *Michigan Cent. R. R. Co.*, 97 N. W. Rep. 392 (Mich.).

That longevity is hereditary the science of biology leaves no room to doubt. In determining any person's expectancy of life, therefore, the ages attained by his parents and grandparents are logically relevant. This evidence is not excluded by the use of the mortality tables, for while these tables are uniformly admitted, they are not conclusive evidence. *Vicksburg, etc., R. R. Co.* v. *Putnam*, 118 U. S. 545. The only question remaining is whether or not the longevity of the parents is of such slight probative value in determining the plaintiff's expectancy of life that it ought not to be submitted to the jury. The fact that life insurance companies have found by experience that it is unsafe to insure persons whose parents and grandparents have died young tends to lead to the conclusion that the evidence should be admitted. But one case raising this question has been found, and in that case the evidence was admitted. *Chattanooga R. R. Co.* v. *Clowdis*, 90 Ga. 258.

EVIDENCE — POST-TESTAMENTARY DECLARATIONS OF TESTATOR. — When last seen a will was in the hands of a person to whose interests its provisions were adverse. Subsequently the testator made statements tending to show that he had revoked the will. In proceedings for probate of the lost will, the contestants sought to introduce evidence of these statements to rebut the presumption that the will was not revoked. *Held*, that the evidence is admissible. *McElroy* v. *Phink*, 76 S. W. Rep. 753 (Tex., Sup. Ct.).

On the question as to the general competency of post-testamentary declarations on issues as to the existence and validity of wills, there is a marked confusion of authority. *Cf. Jackson* v. *Kniffen*, 2 Johns. (N. Y.) 31; *Henry* v. *Hall*, 106 Ala. 84. But since a court might properly be reluctant to dispose of an estate solely upon a presumption arising from the mere custody of a will when last seen, it might well allow evidence to be introduced to rebut such a presumption which would be inadmissible on other issues. Accordingly, although this distinction has not been expressly taken, no case found excluded the evidence when it was introduced merely to rebut a presumption against the existence of a lost will. *Cf. Keen* v. *Keen*, L. R. 3 P. & D. 105. The fact that here the evidence was introduced to rebut a presumption in favor of the existence of a lost will should not distinguish the principal case. The evidence, moreover, is strengthened by all the considerations which justify exceptions to the hearsay rule, namely, the peculiar knowledge of the declarant, the absence of motive to deceive, and the lack of better evidence. *Cf. Sugden* v. *Lord St. Leonard*, 1 P. D. 154.

EVIDENCE — PRIVILEGE — INFERENCE FROM EXCLUSION BY PATIENT OF PHYSICIAN'S TESTIMONY. — A statute provided that physicians should not divulge professional information acquired from a patient. *Held*, that a charge that the jury is not prevented under the law from drawing inferences from a patient's refusal to allow his physician to testify is correct. *Deutschmann* v. *Third Ave. R. R. Co.*, 84 N. Y. Supp. 887.

The statute fails to make express provision either for or against the drawing of an inference against the patient from the exercise of his privilege. In civil actions the exclusion of material evidence by a party, or the failure to produce it if it is in his power to do so, have generally been held to justify an unfavorable inference. *Gulf, etc., Ry. Co.* v. *Ellis*, 54 Fed. Rep. 481. It is the duty of all persons interested in a suit not to prevent the impartial adjudication of the questions at issue, and they cannot complain if an unfavorable inference is drawn from their doing so. Where, however, public policy has dictated legislation expressly reserving to a party the privilege of excluding certain testimony, the general rule should not be applied. For if a party, in exercising the right secured to him by law, thereby exposes his cause to damaging inferences, the benefit of his privilege is practically destroyed. For this reason the decision in the principal case seems questionable.

LIBEL — PHOTOGRAPH OF PLAINTIFF IN CONNECTION WITH LIBELOUS ARTICLE. The defendant published an account of the life of an Italian bandit, illustrating the

article with a photograph of the plaintiff, named underneath as that of the bandit. The article referred to the photograph as that of the brigand, and stated that he was in Italy. The plaintiff was in New York at the time. *Held*, on demurrer, that the facts will sustain an action of libel. *De Sando* v. *New York Herald Co.*, 85 N. Y. Supp. 111.

A man's right to have his good name left unsullied is fundamental. An article which leaves an ordinary person reading it with the impression that the plaintiff has committed a crime is certainly an infringement of this right, and should be actionable as much as if the plaintiff were mentioned by name. *Smith* v. *Sun Publishing Co.*, 50 Fed. Rep. 399. Since in the present case many readers who did not know the plaintiff might, upon seeing him at some future time, connect his face with the crimes of the brigand and set him down as a scoundrel, any decision other than that reached by the court would seem impossible.

LIMITATION OF ACTIONS — ABSENCE OF DEFENDANT FROM STATE — FOREIGN CORPORATIONS. — By the Kansas statute of limitations, if a person is out of the state when the cause of action accrues against him, the statutory period does not begin to run in his favor until he comes into the state. A foreign corporation had property within the state, and maintained an office where service of process could be had on its division superintendent. *Held*, that the statutory period does not run in favor of the corporation. *Williams* v. *Metropolitan St. Ry. Co.*, 74 Pac. Rep. 600 (Kan.).

By the weight of authority, liability to service of process tests the running of the statute. *Lawrence* v. *Ballou*, 50 Cal. 258. But many courts, as in the principal case, conclude that since a corporation cannot exist outside the state which creates it, it cannot, therefore, "come into the state." *Olcott* v. *Tioga Ry. Co.*, 20 N. Y. 10. It is true that a foreign corporation is not within the state even in a sense corresponding to the temporary presence of a natural person, since service can be had, not on any officer, as in the state of domicil, but only on an agent to receive service. The designation of such an agent, however, gives personal jurisdiction of the corporation; and the words "within the state" might reasonably be construed to mean "within the jurisdiction of the state," as the obvious intent of the statute is to exempt from suit all persons, natural or artificial, who have been liable to suit for the statutory period. The principal case commits another jurisdiction to the less reasonable doctrine.

MORTGAGES — EQUITABLE MORTGAGE ON INSURANCE MONEY. — Land was mortgaged to the defendant, the mortgagor agreeing to insure the premises in the defendant's name and the latter, on default, to have the right himself to insure and to add the premiums to the debt. The defendant assigned the mortgage and the debt to the plaintiff, guaranteeing payment, and then purchased the mortgagor's interest without assuming the mortgage, and insured in his own name. The buildings burned and the insurance company, with notice of the provisions of the mortgage, paid the defendant. The plaintiff then sued the defendant and the insurance company in equity for the proceeds of the insurance. *Held*, that the plaintiff has an equitable lien on the proceeds of the policy, enforceable against the company and the defendant. *Hyde* v. *Hartford Fire Ins. Co.*, 97 N. W. Rep. 629 (Neb.).

If a mortgagor, contrary to agreement, makes the policy payable to himself, the mortgagee has an equitable lien on the proceeds. *Nichols* v. *Baxter*, 5 R. I. 491. The same is true if the insured is an assignee of the mortgagor who has assumed the mortgage. *Miller* v. *Aldrich*, 31 Mich. 408; see *James* v. *West*, 65 N. E. Rep. 156. By the better view, the agreement does not run with the land so as to charge an assignee not assuming the mortgage. *Farmers' Loan, etc., Co.* v. *Penn. Plate Glass Co.*, 186 U. S. 434; see *Reid* v. *McCrum*, 91 N. Y. 412. In the principal case such an assignee was denied the insurance on the ground that he had in effect by his guaranty assumed the mortgage; and that by effecting his insurance he unjustly prevented the mortgagee from insuring according to the mortgage. Neither reason seems sound. The defendant's liability remained purely that of guarantor; he assumed no rights or duties under the mortgage. And his insurance deprived the plaintiff of no rights; for a mortgagee, or his assign, has a separate insurable interest. *Hanover Fire Ins. Co.* v. *Bohn*, 48 Neb. 743. Consequently the defendant would seem entitled to insure his separate interest and to keep the proceeds.

MORTGAGES — FORECLOSURE SALE — LIEN OF PURCHASER. — The plaintiff purchased mortgaged property at a foreclosure sale, subject to the right of the defendant, the mortgagor, to redeem within a year. The defendant redeemed but refused to pay taxes which had become an incumbrance upon the estate during the year, and which the plaintiff had paid to secure his lien. The plaintiff then sought to establish a lien on the estate for the amount of the taxes. *Held*, that the lien of the plaintiff extends

only to the amount of his bid and interest. *Government Building and Loan Institution* v. *Richards*, 68 N. E. Rep. 1039 (Ind., App. Ct.).

This follows the trend of the books. *Walton* v. *Hollywood*, 47 Mich. 385; see *Nopson* v. *Horton*, 20 Minn. 268. The conclusion, however, seems to be based on cumulative *dicta* in different cases rather than upon actual decisions or equitable principles. Since the purchaser's right is against the land alone and not against the mortgagor, he cannot recover over against the mortgagor for taxes paid if there is no redemption. *Davis* v. *Dale*, 150 Ill. 239. It does not follow that he may not have a lien for the taxes. A mortgagee may in equity add to the mortgage debt taxes paid before the foreclosure sale to preserve his lien. *Bell* v. *Mayor, etc., of New York*, 10 Paige (N. Y.) 49. Where, as in the principal case, the period of redemption is by statute extended after the sale, it would seem that the purchaser is in a position analogous to that of such a mortgagee and that his lien should similarly cover these taxes. As such a result avoids the undeserved enrichment of the mortgagor involved in the principal case, it seems eminently just. It is reached in some states by statute. See *Davis* v. *Dale*, *supra*.

OFFER AND ACCEPTANCE — ACCEPTANCE BY MAIL. — The plaintiff, a lessee of the defendant, had an option by his lease to purchase the land at any time within the term. He mailed three letters accepting the option within the term, but as communication was interrupted by war, only one reached the defendant, and that after the expiration of the lease. *Held*, that there is no valid contract. *Bal* v. *van Staden*, 20 So. Afric. L. J. 407 (Transvaal, Sup. Ct.). See NOTES, p. 342.

PARENT AND CHILD — PARENT'S LIABILITY FOR INJURING CHILD. — In a suit for damages by a minor child against its parents, the declaration alleged cruel and inhuman treatment. *Held*, that the declaration states no cause of action. *McKelvey* v. *McKelvey*, 77 S. W. Rep. 664 (Tenn.).

It is universally held that the parent is liable criminally for the use of excessive force in the exercise of his right of control and correction. *Commonwealth* v. *Blaker*, 1 Brews. (Pa.) 311. But even here the courts are loath to interfere. *State* v. *Jones*, 95 N. C. 588. No authority has been found for making the parent answerable civilly for personal injuries inflicted upon the child. In fact, the present decision has the support of at least two cases, and is in accord with the reasoning and *dicta* in many others. *Foley* v. *Foley*, 61 Ill. App. 577; *Hewlett* v. *George*, 68 Miss. 703. The argument in favor of the parent's liability appears to be that, on principle, there is no reason why the parent should not be subject to a civil responsibility similar to that of a schoolteacher, who, though standing *in loco parentis*, is liable for excessive punishment. See COOLEY ON TORTS, 2d ed., 197. This argument, however, is more than overcome by practical considerations of public policy, which discourage causes of action that tend both to destroy parental authority, and also to overwhelm the courts with a multitude of petty suits.

PRACTICE — APPEARANCE AS ATTORNEY BY JUDGE. — In a state which was divided into circuits the jurisdictions of which were separate and distinct, a judge of one circuit attempted to appear as an attorney in the court of another circuit. *Held*, that when a lawyer becomes a judge his right to act as an attorney is temporarily suspended. *Perry* v. *Bush*, 35 So. Rep. 225 (Fla.).

The impartial and judicial frame of mind required in a judge makes it desirable that he give up for the time his practice of the law. Furthermore, his appearance before his fellow judges might bring extraneous influences to bear upon the decision of cases. Again, active advocacy by a public officer of the interests of one party to litigation would affect in an unfortunate manner the esteem in which the community holds the judiciary. Consequently it is usually provided by statute or constitutional provision that judges of courts of record shall not practise as attorneys. *Cf. Wood* v. *Keith*, 60 Ark. 425; *Seymour* v. *Ellison*, 2 Cow. (N. Y.) 13. In the absence of statute, as in the principal case, it is believed that the court itself can prevent a judge from practising, under its inherent power to preserve the proprieties of the bar and to prevent the miscarriage of justice. In some states by statute circuit judges are permitted to practise in courts other than their own. *O'Hare* v. *Chicago, etc., R. R. Co.*, 139 Ill. 151; *Morton* v. *Detroit, etc., R. R. Co.*, 81 Mich. 423. A judge may, of course, always appear for himself. *Libby* v. *Rosekrans*, 55 Barb. (N. Y.) 202.

QUASI-CONTRACTS — RECOVERY AGAINST A MUNICIPAL CORPORATION. — A contractor, under a contract with the city of Chicago, was employed to construct a certain public improvement. Alterations were made in the work at the order of certain public officials who had no authority to make the changes. *Held*, that if the city has not ratified the alterations, the contractor can recover against it in quasi-contract. *City of Chicago* v. *McKechney*, 68 N. E. Rep. 954 (Ill.). See NOTES, p. 343.

SEDUCTION — SURVIVAL OF ACTION TO THE MOTHER. — The defendant seduced the plaintiff's daughter while both parents were living. Prior to the commencement of suit the girl's father died. *Held*, that the mother has no right of action. *Hamilton* v. *Long*, 116 L. T. 171.

This decision is an affirmance by the Court of Appeal of the decision in the court below, which was commented on in 16 HARV. L. REV. 298.

SET-OFF AND COUNTERCLAIM — JURISDICTION OF LOWER COURTS. — In an action in a New York county court, the plaintiff filed a complaint for $900. The defendant filed a counterclaim for $30,000. The jurisdiction of county courts is limited to actions in which the complainant demands judgment for a sum not exceeding $2,000. *Held*, that the county court has jurisdiction over the counterclaim. *Howard Ironworks* v. *Buffalo Elevating Co.*, 176 N. Y. 1. See NOTES, p. 350.

STATES — ACQUISITION BY ONE STATE OF THE TERRITORY OF ANOTHER BY PRESCRIPTION. — The state of Wisconsin had exercised sovereignty over a certain island for over fifty years. In a suit between two individuals, the defendant disputed the plaintiff's title to the island, which was based on a patent granted by the state of Wisconsin, on the ground that according to the true boundary line between Wisconsin and Minnesota the island lay within the territory of the state of Minnesota. *Held*, that, as between the parties, the exercise of sovereignty by Wisconsin for the stated length of time is conclusive as to the proper location of the boundary line between the states. *Franzini* v. *Layland*, 97 N. W. Rep. 499 (Wis.). See NOTES, p. 346.

TAXATION — SUCCESSION TAX — DEBT DUE FROM FOREIGN DEBTOR. — The testatrix died domiciled in Vermont, leaving debtors in New York. The Vermont statutes impose a succession tax on "all property within the jurisdiction of this state . . . which shall pass by will or by the intestate laws of this state." *Held*, that the debts are not subject to the tax. *In re Joyslin's Estate*, 56 Atl. Rep. 281 (Vt.).

The court considers that the debts are for purposes of administration located in New York at the home of the debtor, and hence are not "property within the jurisdiction" of Vermont, and pass, not by the laws of Vermont, but by the laws of New York. But even granting the debts to be personalty actually located in New York, they would by a generally adopted fiction be regarded, for purposes of general taxation, as being within the jurisdiction in which their owner is domiciled. Succession tax cases almost without dissent apply the same rule. *Frothingham* v. *Shaw*, 175 Mass. 59. Moreover, it is by virtue of Vermont law that such property passes to the legatee. *Eidman* v. *Martinez*, 184 U. S. 578. New York, having actual control of personalty there located, could, it is true, dispose of it absolutely. In fact, however, New York permits the Vermont law to determine the succession, so that by the consent of New York the law of each state has a share in the passing of the property. N. Y. CODE, § 2694; see also *Blackstone* v. *Miller*, 188 U. S. 189. The Vermont statute by the better view should be regarded as applying to the property in question.

TAXATION — VALIDITY OF TAXES ASSESSED BEFORE AND CONFIRMED AFTER EXERCISE OF EMINENT DOMAIN. — The city of New York took the plaintiff's land by eminent domain. Prior to the passing of title to the city the annual tax upon the property was assessed to the plaintiff, but the assessment was not confirmed until after the transfer. *Held*, that the tax cannot be collected. *Buckhout* v. *City of New York*, 176 N. Y. 363.

The decision in the principal case in denying the validity of the tax in question seems sound. In New York the assessment of property is only an initial step in the process of taxation. See *Lathers* v. *Keogh*, 109 N. Y. 583. The taxing power with regard to land taken by eminent domain is necessarily extinguished when ownership vests in the city. The city, having exercised its right to take the land during the progress of tax proceedings, should not be entitled thereafter to continue those proceedings. When, subsequently to assessment, transfers of land between citizens have taken place, it has been held that the personal liability of the grantor for taxes is fixed by the assessment. *Rundell* v. *Lakey*, 40 N. Y. 513. But conceding that a liability does so arise, its enforcement by the city is conditional upon the completion of the tax. Since the city, after the exercise of eminent domain, has no power to perfect the incomplete tax, its conditional claim against the owner based on a previous assessment cannot be enforced.

TRUSTS — CONFLICTING EQUITIES — FOLLOWING TRUST PROPERTY. — One Wood held an option for the purchase of certain land in trust for a corporation, and, having received stock and bonds from the corporation, he assumed the duty to pay the pur-

chase price out of his own substance. He was also a trustee of a fund for a third party, and, in breach of trust, used a part of the fund to pay for the land, and received title. *Held*, that, as between the corporation and the third party, the former is entitled to the land to the exclusion of the latter. *Seacoast R. R. Co.* v. *Wood*, 56 Atl. Rep. 337 (N. J. Ch.). See NOTES, p. 352.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

RESCISSION FOR BREACH OF WARRANTY. — An article by Professor Williston in 16 HARV. L. REV. 465, on this subject, has called forth a reply from the author of a well-known treatise on Sales, Professor Francis M. Burdick, of Columbia Law School. *Rescission for Breach of Warranty*, 4 Columbia L. Rev. 1 (Jan. 1904). Professor Burdick, though evidently not in sympathy with the so-called "Massachusetts rule" which Professor Williston supports, devotes his attention mainly to the effort to show that of the twelve states which were cited as having adopted this view, only six are committed to it, and three of these by *dicta* only. Most of the cases cited by Professor Williston would, he declares, have been similarly decided in England.

It is apparent that so complete a disagreement as to the classification of cases, between such learned and careful investigators, must be based on different views as to the location of the boundary line on one side or the other of which a case is to be ranged. Professor Williston finds the real distinction taken by the English law to be that between executed and executory contracts, no rescission being allowed in any case of an executed sale. Professor Burdick, on the other hand, finds the English distinction to lie between conditions and collateral warranties, the purchaser being allowed to rescind even after acceptance of title for the breach of a condition.

Among "conditions" the Sale of Goods Act includes the implied engagement that the vendor has title, that goods ordered by description shall correspond with the description and be merchantable, etc., §§ 12, 13, 14. In nearly all of the cases in dispute the engagement fell within one of these classes, and, after acceptance of the title, rescission was allowed upon discovery of the defect. *Polhemus* v. *Heiman*, 45 Cal. 573. *Gale, etc., Manufacturing Co.* v. *Stark*, 45 Kan. 606. *Branson* v. *Turner*, 77 Mo. 489. When Professor Burdick says that these cases would be similarly decided in England, he must, it would seem, overlook or misinterpret § 11, (1), c, of the Sale of Goods Act, which provides that "where . . . the buyer has accepted the goods . . ., or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect." Exactly what would amount to an "implied term" in the contract, allowing rescission, it may be hard to say: but clearly such a term is not to be implied merely because there is a condition, for this would render the section absolutely meaningless. It is of course true that even in England the buyer has a reasonable time to examine the goods before accepting title. *Okell* v. *Smith*, 1 Stark. N. P. 107. See *Street* v. *Blay*, 2 B. & Ad. 456, 463. But surely there can be no ground for contention that the property had not passed in a case where the guano purchased had been put into the soil by the buyer, as in *Pacific, etc., Co.* v. *Mullen*, 66 Ala. 582. The other cases are only less clear. In practically all of the cases in question the language of the courts goes the full length, nor is a possible distinction between conditions and warranties anywhere adverted to.